

### REMARKS

This Application has been carefully reviewed in light of the Final Office Action mailed January 12, 2006. At the time of the Final Office Action, Claims 1-14 and 16-34 were pending in this Application. Claims 2-14 and 16-34 were rejected. Claim 1 was previously allowed. Claim 15 was previously cancelled without prejudice or disclaimer. Claims 2, 3, 5, 7, 11, 17, 18, 19, 26 and 27 have been amended to further define various features of Applicants' invention. Applicants respectfully request reconsideration and favorable action in this case.

#### **Rejections under 35 U.S.C. § 112 ¶1, Enablement**

Claims 2-14 and 16-34 were rejected by the Examiner under 35 U.S.C. §112, first paragraph, as failing to comply with the enablement requirement. The Examiner indicates that, while being enabling for SEQ ID NO: 1, the specification does not reasonably provide enablement for sequences having only 60% sequence identity to SEQ ID NO: 1. Applicants amend all rejected independent claims to overcome this rejection..

Specifically, Applicants have amended Claims 2, 3, 5, 7, 11, 17, 18 and 26 to recite promoters at least 98% homologous to SEQ. ID. NO. 1. Applicants believe that it, despite the large number of bases in SEQ. ID. NO. 1, it would not be unduly burdensome for one skilled in the art to test variants that would remain at least 98% homologous. Additionally, while degenerate code and conservative substitution considerations, which are often the basis for claiming sequences having a certain % homology to a coding region, do not apply to promoters, Applicants assert that similar guiding knowledge is available in the context of promoters. In particular, it is well known that certain promoter regions may not be changed without severely interfering with promoter activity. For example, the TATA box is required for an effective promoter. This box and as well as the CAT box are indicated in Figure 1. (See Figure 1 and p. 10, lines 14-15.) Initiator regions are also of known importance. One skilled in the art would recognize that changes in important regions, such as the TATA box, are likely to produce nucleic acids not capable of functioning as a promoter. Thus, one skilled in the art would likely avoid changes in those regions.

In short, the existence of regions necessary for promoter activity actually further limits the number of variant promoters one skilled in the art might test and thus makes testing more manageable and routine.

Applicants amend all rejected independent claims, Claims 2, 3, 5, 7, 11, 17, 18 and 26 to overcome these rejections and respectfully request full allowance of Claims 2-14 and 16-34 as amended.

**Rejections under 35 U.S.C. § 112 ¶1, Written Description**

Claims 2-14 and 16-34 were rejected by the Examiner under 35 U.S.C. §112, first all rejected independent claims to overcome these rejections and respectfully request full allowance of Claims 2-14 and 16-34 as amended.

Applicants have amended the claims to recite a nucleic acid having a sequence 98% homologous to SEQ. ID. NO. 1. Thus greatly reduces the number of species in the genus as compared to the 60% previously the claims. Further, as explained above, there are conserved promoter regions very likely to be present in or even required to be in allelic variants and other mutants that are able to function as a promoter. Thus, the genus as currently claimed has a limited number of species that are adequately described by the specification and knowledge in the art, particularly knowledge relating to conserved promoter elements.

**Allowable Subject Matter**

Claim 1 is allowable. This claim is not amended in the current response.

**Information Disclosure Statement**

Applicants enclose an Information Disclosure Statement and PTO Form 1449, with copies of the references and a check in the amount of \$180.00, for the Examiner's review and consideration.

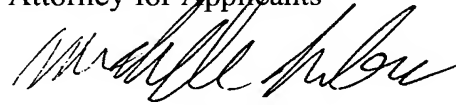
**CONCLUSION**

Applicants have now made an earnest effort to place this case in condition for allowance in light of the amendments and remarks set forth above. Applicants respectfully request reconsideration of the pending Claims.

Applicants believe there are no additional fees due at this time, however, the Commissioner is hereby authorized to charge any fees necessary or credit any overpayment to Deposit Account No. 02-0384 of Baker Botts L.L.P.

If there are any matters concerning this Application that may be cleared up in a telephone conversation, please contact Applicants' attorney at 512.322.2580.

Respectfully submitted,  
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Date: 3/10/06

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Enclosure: 1) Information Disclosure Statement and PTO 1449 Form, with copies of references and a check in the amount of \$180.00.